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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91185256
Party	Plaintiff Room Service Home, LP and R S Design, Inc. d/b/a Room Service by Ann Fox
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Submission	Motion to Dismiss - Rule 12(b)
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Signature	/Seth A. Horwitz/
Date	09/10/2008
Attachments	Opposers Response, Motion and Amended Opposition.pdf ( 20 pages ) (1397400 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF U.S. APPLICATION SERIAL NO. 76/071,006

Mark: ROOMSERVICE

Filed: June 15, 2000

Published: September 25, 2007

Room Service Home, LP and R S Design, Inc., d/b/a Room Service by Ann Fox  <div style="text-align:right">Opposers,</div> <div style="text-align:center">v.</div> Room Service Interiors, Ltd.  <div style="text-align:right">Applicant.</div>	Opposition No. 91185256
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**OPPOSERS' RESPONSE TO APPLICANT'S MOTION TO DISMISS AS UNTIMELY  
AND FOR FAILURE TO STATE A CLAIM**

Opposers Room Service Home, LP and R S Design, Inc., d/b/a Room Service by Ann Fox (collectively "Opposers") hereby submit their Opposers' Response to Applicant's Motion to Dismiss as Untimely and for Failure to State a Claim ("Opposers' Response") as follows:

**FACTS**

1. Applicant's trademark application Serial No. 76/071,006 was published for opposition on September 25, 2007.
2. Opposer Room Service Home, LP ("Opposer Room Service") filed a Request for Extension of Time to Oppose on September 27, 2008. Such request was granted.
3. Opposer R S Design, Inc. ("Opposer R S Design") did not request an extension of time to oppose.
4. On November 23, 2007, within the extended period, Opposers joined together in filing the subject Notice of Opposition.

5. On August 26, 2008, Applicant filed Applicant's Motion to Dismiss Opposition as Untimely Under 15 U.S.C. § 1063 With Respect to Opposer R S Design, Inc. and for Failure to State a Claim Under Rule 12(b)(6) With Respect to Opposer Room Service Home, LP ("Applicant's Motion").

6. Applicant's Motion alleged that the Notice of Opposition did not allege facts sufficient to show that Opposers are in privity.

7. Applicant's Motion argued that, as a result of Opposers not alleging facts in their Notice of Opposition sufficient to Show that Opposers are in privity, Opposer R S Design could not take advantage of Opposer Room Service's Request for Extension of Time to Oppose, and therefore, Opposer R S Design's participation in the Notice of Opposition was untimely (the 15 U.S.C. § 1063 arguments).

8. Applicant's Motion further argued that, as a result of Opposers not alleging facts in their Notice of Opposition sufficient to Show that Opposers are in privity, Opposer Room Service could not take advantage of Opposer R S Design's priority dates for the subject marks, and therefore, Opposer Room Service could not allege facts sufficient to maintain its opposition.

9. Opposers submit herewith their Opposers' Motion for Leave to Amend Notice of Opposition, their proposed Amended Notice of Opposition, and the Declaration of Ann Fox in Support of Opposer's Motion for Leave to Amend and Opposer's Response to Applicant's Motion to Dismiss (the "Declaration of Ann Fox"), each of which is incorporated herein by reference.

10. The Amended Notice of Opposition was amended to recite additional facts showing that Opposers are in privity. Such facts are recited *infra* at ¶¶ 11-15.

11. Ann Fox owns 100% of the shares of RS Design, Inc. d/b/a Room Service by Ann Fox. *See*, Declaration of Ann Fox ¶ 2. The Declaration of Ann Fox is attached to the Amended Notice of Opposition as “Exhibit A” and incorporated herein by reference.

12. Ann Fox owns 50% of the shares of Room Service Management, LLC a Texas limited liability corporation. Ms. Fox acquired such interest prior to September 27, 2007, the date when Room Service Home, LP filed its request for an extension of time to oppose. *See*, Declaration of Ann Fox, ¶ 3.

13. Donna King owns 50% of the shares of Room Service Management, LLC a Texas limited liability corporation. Ms. King acquired such interest prior to September 27, 2007. *See*, Declaration of Ann Fox, ¶ 4.

14. Room Service Management, LLC is the general partner of Room Service Home, LP. *See*, Declaration of Ann Fox, ¶ 5.

15. Donna King and Ann Fox jointly and severally exercise control over use by Room Service Home, LP of the Room Service mark. *See*, Declaration of Ann Fox, ¶ 6.

## **ARGUMENTS AND AUTHORITIES**

### **A. Privity Requirement**

16. TBMP § 206.2 states that “An extension of time to oppose is a personal privilege which inures only to the benefit of the party to which it was granted and those in privity with that party... [A] request for a further extension, or an opposition, filed by a different party will not be rejected on that ground if it is shown to the satisfaction of the Board that the different party is in privity with the party granted the previous extension(s).”

17. Opposer Room Service filed a request for an extension of time to oppose, which was granted, in which Opposer R S Design did not join. Opposers Room Service and R S

Design filed a Notice of Opposition within the extended period of time. Therefore, under TBMP § 206.2, Opposer R S Design was timely made a party to the Notice of Opposition if Opposers are in privity.

18. If Opposers are in privity, Opposer Room Service may rely on Opposer R S Design's priority dates in the subject marks. *See, Diarama Trading Co. v. J. Walter Thompson U.S.A., Inc.*, 2005 U.S. Dist. LEXIS 19496, \*21-22 (S.D.N.Y. Sept. 6, 2005); *Patsy's Italian Rest., Inc. v. Banas*, 508 F. Supp. 2d 194, 217-218 (E.D.N.Y. 2007).

#### **B. Definition of Privity**

19. TBMP § 206.2 recites the definition for "privity" in *Black's Law Dictionary* (Fifth Edition, 1979):

Mutual or successive relationship to the same rights of property. In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.

20. TBMP § 206.2 further states that "In the field of trademarks, the concept of privity generally includes, inter alia, the relationship of successive ownership of a mark (e.g. assignor, assignee) and the relationship of "related companies" within the meaning of Sections 5 and 45 of the Act, 15 U.S.C. §§ 1055 and 1127."

21. 15 U.S.C. § 1055 states:

Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public. If first use of a mark by a person is controlled by the registrant or applicant for registration of the mark with respect to the nature and quality of the goods or services, such first use shall inure to the benefit of the registrant or applicant, as the case may be.

22. 15 U.S.C. § 1127 states that “The term “related company” means any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used.”

23. The cases cited by TBMP § 206.2 to support the inclusion of “related companies” as defined by 15 U.S.C. §§ 1055 and 1127 are well chosen. *See, e.g., Rolex Watch U.S.A., Inc. v. Madison Watch Co.*, 211 USPQ 352, 358 (TTAB 1981) (connecting control over manufacturing processes with privity); *F. Jacobson & Sons, Inc. v. Excelled Sheepskin & Leather Coat Co.*, 140 USPQ 281, 282 (Comm’r 1963) (explicitly referring to Section 5 of the Act, i.e. 15 U.S.C. § 1055, to support allowing a company to take advantage of the request for extension of time filed by a “related company”).

24. Applicant cites *International Nutrition Co. v. Horphag Reasearch Ltd.*, 55 USPQ2d 1492, 1495 (Fed. Cir. 2000) for a principle which the holding of such case does not support (*See*, Applicant’s Motion, p. 4). Specifically, the court in *International Nutrition* declined to find privity between two companies where a founder of the first company was an owner of the second company. *See, International Nutrition* at 1495. The court in *International Nutrition* did not disclose whether the founder of the first company was an owner of that first company, or what percentage ownership such person owned in either company.

### **C. Opposers are in Privity**

25. Ann Fox wholly owns Opposer R S Design. *See*, Declaration of Ann Fox, ¶ 2. Ann Fox also owns 50% of the general partner of Opposer Room Service. *See, Id.*, ¶¶ 3 and 5. Ann Fox controls the use of the Room Service mark by Opposer Room Service. *See, Id.*, ¶ 6.

26. Opposers are in privity because they share common ownership and common control. *See*, TBMP § 206.2; 15 U.S.C. §§ 1055 and § 1127; *Argo & Company, Inc. v.*

*Carpetsheen Manufacturing, Inc.*, 187 USPQ 366, 367 (TTAB 1975) (finding privity based on common ownership and control); and *F. Jacobson & Sons* at 282.

### CONCLUSIONS

27. Opposers have alleged facts sufficient to show they are in privity in their Amended Notice of Opposition. Therefore, Opposer R S Design may take advantage of Opposer Room Service's request for extension of time, meaning that **Opposer R S Design was timely made a part of this lawsuit**; and Opposer Room Service may rely on Opposer R S Design's 1987 (or earlier) priority dates, meaning that **Opposer Room Service may state a claim opposing Applicant's application by alleging use predating Applicant's December 17, 1999, priority date.**

28. Therefore, Applicant's Motion should be DENIED.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF U.S. APPLICATION SERIAL NO. 76/071,006

Mark: ROOMSERVICE

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Room Service Home, LP and R S Design, Inc., d/b/a Room Service by Ann Fox  <div style="text-align: right;">Opposers,</div> <div style="text-align: center;">v.</div> Room Service Interiors, Ltd.  <div style="text-align: right;">Applicant.</div>	Opposition No. 91185256
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**OPPOSERS' MOTION FOR LEAVE TO AMEND NOTICE OF OPPOSITION**

Pursuant to TBMP § 507.01 *et seq.*, Opposers Room Service Home, LP and R S Design, Inc., d/b/a Room Service by Ann Fox (collectively "Opposers") hereby submit their Opposers' Motion for Leave to Amend Notice of Opposition ("Opposers' Motion") as follows:

1. On August 26, 2008, Applicant filed its Applicant's Motion to Dismiss Opposition as Untimely Under 15 U.S.C. § 1063 With Respect to Opposer R S Design, Inc. and for Failure to State a Claim Under Rule 12(b)(6) With Respect to Opposer Room Service Home, LP ("Applicant's Motion").

2. Applicant's Motion argued that Opposers were not in sufficient privity with each other for Opposer Room Service Home, LP to receive the benefit of Opposer R S Design, Inc.'s Request for Extension of Time to Oppose.

3. Opposers' proposed Amended Notice of Opposition, submitted herewith, has been amended to include additional facts showing that Opposers are in privity with each other.

4. Opposers are further submitting herewith, attached as "Exhibit A" to Opposers' proposed Amended Notice of Opposition, the Declaration of Ann Fox in Support of Opposer's Motion for Leave to Amend and Opposer's Response to Applicant's Motion to Dismiss (the "Declaration of Ann Fox").

5. The Declaration of Ann Fox contains Ms. Fox's statement, under penalty of perjury as permitted by 28 U.S.C. § 1746, that the additional facts included in Opposers' proposed Amended Notice of Opposition are true.

6. Opposers seek leave to amend their Notice of Opposition solely for the purpose of effectively responding to Applicant's Motion. Opposers submit their Opposers' Motion in good faith, without intent to delay this proceeding or unduly prejudice Applicant.

#### **ARGUMENTS AND AUTHORITIES**

##### **A. Opposers are Entitled to One Amendment**

7. Opposers may amend their Notice of Opposition once as a matter of course at any time before a responsive pleading is served. *See*, TBMP § 507.02; FRCP 15(a).

8. A "responsive pleading" means a pleading as defined by FRCP 7(a); a motion to dismiss is not a responsive pleading. *See, Duda v. Board of Educ. Of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1056-57 & n.2 (7th Cir. 1998); *McGuire v. Turnbo*, 137 F.3d 321, 325 n.4 (5th Cir. 1998).

9. The only pleadings filed to date by Applicant in this proceeding have been Applicant's Motion (to dismiss) and its associated brief.

10. Opposers have not previously amended their Notice of Opposition.

11. Consequently, Opposers are entitled to amend their Notice of Opposition once.

##### **II. Opposers' Motion for Leave to Amend Should Be Granted Even if Opposers are Not Entitled to Amend as a Matter of Right**

12. “[L]eave [to amend] must be freely given when justice so requires... the Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties.” TBMP § 507.02, *citing* FRCP 15(a).

13. Applicant has not yet filed its answer and discovery has not begun. Therefore, no undue delay or prejudice to Applicant should result from granting Opposers’ Motion. Opposers submit their Opposers’ Motion in good faith, with no dilatory motive. Consequently, Opposers’ Motion should be granted. *See, Foman v. Davis*, 371 U.S. 178, 182 (1962) (in which the Supreme Court directed the district court to grant leave to amend unless there is a good reason to deny leave, such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the other party).

### **CONCLUSIONS**

14. Whether as a matter of right or within the TTAB’s discretion, for the forgoing reasons, Opposers request that their Motion for Leave to Amend be granted and their proposed Amended Notice of Opposition be filed of record as an amendment to Opposers’ original Notice of Opposition.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY

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Room Service Home, LP and R S Design, Inc., d/b/a Room Service by Ann Fox	
Opposers,	
v.	Opposition No. 91185256
Room Service Interiors, Ltd.	
Applicant.	

**CERTIFICATE OF SERVICE**

I certify that the foregoing **Opposers' Motion for Leave to Amend Notice of Opposition** is being filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board via electronic means at <http://www.uspto.gov> on this 10th day of September, 2008.

I further certify that a copy of the foregoing **Opposers' Motion for Leave to Amend Notice of Opposition** is being served on Applicant through its attorney of record by mailing a true and correct copy via First Class Mail, this 10th day of September, 2008, in an envelope addressed as follows:

Mr. Paul G. Juettner  
Greer, Burns & Crain, Ltd.  
300 S. Wacker Drive, Suite 2500  
Chicago, Illinois 60606

BY: /Seth A. Horwitz /  
Seth A. Horwitz

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**AMENDED NOTICE OF OPPOSITION**

Opposers Room Service Home, LP, a limited partnership organized under the laws of the State of Texas, and R S Design, Inc., d/b/a "Room Service by Ann Fox," a corporation organized under the laws of the State of Texas, both having a business address of 6334 Maple Avenue, Dallas Texas 75235 (collectively "Opposers"), hereby oppose the mark ROOMSERVICE that is the subject of application Serial No. 76/071,006, filed on June 15, 2000 by Room Service Interiors, Ltd. ("Applicant") for use in connection with "ongoing television and radio programs in the field of architecture, antiques, furniture, interior design, and decorating" in International Class 41, which application was published in the *Official Gazette* of September 25, 2007, and request that registration to Applicant be refused.

As grounds for opposition, Opposers allege as follows:

1. Opposer R S Design, Inc., and its predecessors in title have continuously provided interior design services and operated a retail store for home furnishings in Dallas, Texas since

1987. Also since 1987, R S Design, Inc. or its predecessors has advertised and provided interior design services in many locations in the United States, including the states of Texas, Colorado, California, and New York.

2. Ann Fox owns 100% of the shares of RS Design, Inc. d/b/a Room Service by Ann Fox. *See*, Declaration of Ann Fox in Support of Opposer's Motion for Leave to Amend and Opposer's Response to Applicant's Motion to Dismiss ("Declaration of Ann Fox") ¶ 2, a true and correct copy of which is attached hereto as "Exhibit A" and incorporated herein by reference.

3. Ann Fox owns 50% of the shares of Room Service Management, LLC a Texas limited liability corporation. Ms. Fox acquired such interest prior to September 27, 2007, the date when Room Service Home, LP filed its request for an extension of time to oppose. *See*, Declaration of Ann Fox, ¶ 3.

4. Donna King owns 50% of the shares of Room Service Management, LLC a Texas limited liability corporation. Ms. King acquired such interest prior to September 27, 2007. *See*, Declaration of Ann Fox, ¶ 4.

5. Room Service Management, LLC is the general partner of Room Service Home, LP. *See*, Declaration of Ann Fox, ¶ 5.

6. Donna King and Ann Fox jointly and severally exercise control over use by Room Service Home, LP of the Room Service mark. *See*, Declaration of Ann Fox, ¶ 6.

7. R S Design, Inc. and Room Service Home, LP are related companies with common ownership, and both have continued to advertise and use the ROOM SERVICE and ROOM SERVICE HOME marks in connection with interior design services and retail sales. Since January, 2004, Room Service Home, LP has operated an online catalog store, advertising nationwide and selling into most states of the United States.

8. R S Design, Inc. and Room Service Home, LP are in privity.

9. Opposer R S Design, Inc., d/b/a Room Service by Ann Fox, has rendered interior design services to customers in the Dallas-Fort Worth metropolitan area since at least 1987 using the ROOM SERVICE mark. Further, since at least that date, R S Design, Inc., d/b/a Room Service by Ann Fox, has advertised and rendered interior design services to customers in other states, including Texas, Colorado, California and New York, under the ROOM SERVICE mark.

10. Since at least 1987 Opposer R S Design, Inc., d/b/a Room Service by Ann Fox, has also operated a retail store in Dallas, Texas, selling home furnishings and interior decorating accessories, such as furniture, bedding, lighting, wall décor and baby-room furnishings under the ROOM SERVICE mark, as may be seen on its web site at <http://roomservicebyannfox.com>.

11. Since at least 2004, Opposer Room Service Home, LP, has operated an online store from Dallas, Texas at the web site address of <http://roomservicehome.com>, selling home furnishings including furniture, lighting, bedding, décor accessories, gifts and bath accessories, among other boutique interior decorating goods under the ROOM SERVICE HOME mark, continuing to build upon the business goodwill created by R S Design, Inc. in the ROOM SERVICE mark.

12. Opposers have invested a substantial amount of time, money and effort in advertising and promoting their goods and services in connection with the ROOM SERVICE marks.

13. Because of Opposers' advertising and promotional efforts, as well as their long and extensive use of the trademarks ROOM SERVICE and ROOM SERVICE HOME throughout the United States, the public has come to associate these trademarks with Opposers.



14. Opposers' dates of first use of the trademarks ROOM SERVICE and ROOM SERVICE HOME precede any date on which Applicant may rely, and in any event are long prior to December 17, 1999, the priority date of claimed in Applicant's application under Section 44(d). Applicant has not shown use of its proposed mark ROOMSERVICE in the United States for the services identified in its application.

15. Applicant's proposed mark ROOMSERVICE is likely to be confused with Opposers' marks, and will be used in connection with services related to those of Opposers in that both services involve interior design and decorating.

16. Upon information and belief, the use and registration by Applicant of the proposed mark ROOMSERVICE for the services identified in the application will enable Applicant to use and trade on the goodwill established by Opposers in their trademarks, ROOM SERVICE and ROOM SERVICE HOME.

17. Based on the similarity of the marks and the similar nature of the services for which they are used, the use and registration by Applicant of the proposed mark is likely to cause confusion or mistake or to deceive the purchasing public into believing that Applicant's services are the services of Opposers, or either of them, or that Applicant's services are sponsored, approved of or endorsed by Opposers, or that Applicant and Opposers are otherwise related.


18. By reason of the foregoing, Opposers will be damaged by the registration of Applicant's confusingly similar mark.

WHEREFORE, Opposers pray opposition be sustained and that the registration sought by Application Serial No. 76/071,006 be denied.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY

BY:



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I further certify that a copy of the foregoing **Amended Notice of Opposition** is being served on Applicant through its attorney of record by mailing a true and correct copy via First Class Mail, this 10th day of September, 2008, in an envelope addressed as follows:

Mr. Paul G. Juettner  
Greer, Burns & Crain, Ltd.  
300 S. Wacker Drive, Suite 2500  
Chicago, Illinois 60606

BY: \_\_\_\_\_

Seth A. Horwitz

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**DECLARATION OF ANN FOX IN SUPPORT OF OPPOSER'S MOTION FOR LEAVE  
TO AMEND AND OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS**

1. My name is Ann Fox. I am over the age of eighteen, have never been convicted of a felony, and am fully qualified to make this Declaration. I file this Declaration under 28 U.S.C. § 1746.
2. I own 100% of the shares of RS Design, Inc. d/b/a Room Service by Ann Fox.
3. I own 50% of the shares of Room Service Management, LLC a Texas limited liability corporation. I acquired such interest prior to September 27, 2007, the date when Room Service Home, LP filed its request for an extension of time to oppose.
4. Donna King owns 50% of the shares of Room Service Management, LLC a Texas limited liability corporation. Ms. King ~~acquired~~ <sup>AP</sup> acquired such interest prior to September 27, 2007.
5. Room Service Management, LLC is the general partner of Room Service Home, LP.

DECLARATION OF ANN FOX IN SUPPORT OF OPPOSER'S MOTION FOR LEAVE TO AMEND  
AND OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS  
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PAGE 1

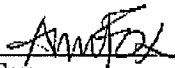
Exhibit A

6. Donna King and I jointly and severally exercise control over use by Room Service Home, LP of the Room Service mark.

Further deponent sayeth not.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on 9/9/08 at \_\_\_\_\_.

  
\_\_\_\_\_  
Ann Fox